Paige, 427; or an action to compel the payment of subsequent rent or the performance of the covenants of the lease. Jones *vs.* Carter, 15 M. & W. 718.

(2) There is no doubt, as is stated in the foregoing opinion, that weight of authority is that, under the usual clause of forfeiture, the breach of a condition in a lease does not make it absolutely void, but only voidable at the election of the landlord; and that re-entry, or what is equivalent thereto, must be resorted to by him, to enforce the election. In addition to the cases cited in the foregoing opinion, Doe *vs.* Banks, 4 B. & A. 401; Rede *vs.* Farr, 6 M. & S. 121; Doe *vs.* Meux, 4 B. & C. 606; Doe *vs.* Birch, 1 M. & W. 406; Doe *vs.* Lewis, 5 A. & E. 277; Clarke *vs.* Jones, 1 Denio, 577; Phillips *vs.* Chesson, 12 Ired. 194. But in Pennsylvania, this appears not to be the law; and the breach of condition is held to avoid the lease absolutely: Kenrick *vs.* Smith, 7 Watts & Serg. 47; Shaeffer *vs.* Shaeffer, 1 Wright, 527; Davis *vs.* Moss, 2 Id. 346. But it deserves notice, that the question did not distinctly arise in either of these cases. The first was substantially that of a vendee under articles, so that the landlord had still the legal title. In the second he had present possession for a limited estate; and the third was that of a mining lease, in which the landlord had a general possession of the land subject to the mining right.

(3) The established rule at common law has always been, that where a right of re-entry is claimed on the ground of a forfeiture for non-payment of rent, there must be proof of a demand of the precise sum due, on the most notorious part of the demised premises, at a convenient time before sunset on the day when the rent is due. Co. Litt. 202 a; 1 Williams & Saunders, 287; Clun's Case, 10 Rep. 129 a; Cropp *vs.* Hambleton, Co., Eliz. 48; Wood & Chevor's Case, 4 Leonard, 180; Tinkler *vs.* Prentice, 4 Taunt. 549; Acocks *vs.* Phillips, 5 Hurlst. & Norm. 183; and this has been generally followed in the United States. Conner *vs.* Bradley, 1 How. U. S. 217; 17 Pet. 267; Jackson *vs.* Harrison, 17 Johns. 70; Remsen *vs.* Concklin, 18 Id. 450; Jackson *vs.* Kepp, 3 Wend. 230; Van Rensselaer *vs.* Jewell, 2 Comst. 147; McCormick *vs.* Connell, 6 Serg. & R. 153; Stover *vs.* Whitman, 6 Binn. 419; Gage *vs.* Smith, 14 Maine, 466; James *vs.* Reed, 15 New Hamp. 68; Jewett *vs.* Berry, 20 Id. 46; McQuester *vs.* Mergher, 34 Id. 400; Chapman *vs.* Wright, 20 Illinois, 120; Eichart *vs.* Bargus, 12 B. Monroe, 464; Mackuben *vs.* Whitecraft, 4 Harr. & John. 135; Yale *vs.* Crewson, 6 Ind. 65; Phillips *vs.* Doe, 3 Ind. 132; Gaskill *vs.* Tramer, 3 Calif. 334.

H. W.

In the New York Court of Appeals.

CHESTER M. FOSTER ET AL. *vs.* DENIS JULIEN, APPELLANT.[1]

1. A. made his promissory note in the city of New York, payable generally. He resided at the time in New York, as well as the endorser. Before the note fell due, he removed to New Jersey, where he resided at its maturity. *Held*, that it was not necessary for the holder, in order to charge the endorser, to present the note for payment at the maker's former place of residence in New York.

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[1] We are indebted to the courtesy of Judge Davies for the following opinion, for which he will accept our thanks.—Eds. A. L. Reg.

2. The cases of Anderson *vs.* Drake, 14 Johnson, 114, and Taylor *vs.* Snyder, 3 Denio, 145, commented upon, and the case of Wheeler *vs.* Field, 6 Metcalf, 290, overruled.

The opinion of the Court was delivered by

DAVIES, J.—This is an action upon a promissory note, made by one George Varden, payable to the order of the defendant, and by him indorsed. The note was dated at New York, where the maker resided at the time, and the indorser resided in the same city. The note was dated May 3d, 1855, and had three months to run. About the middle of June following, the maker removed to the State of New Jersey, and continued to reside there until Sept. 24, 1855. The note fell due August 6th, and was protested, and notice of protest duly given to the defendant. From the facts found, it appears that the notary, on the day the note fell due, made inquiries for the maker at the Post Office in the City of New York, and, to ascertain his residence, examined the City Directory, but the maker's residence, on such inquiry, could not be found. The Judge, upon those facts, found, as a question of law, that the removal of the maker from the State of New York into the State of New Jersey, and his continued residence there up to the maturity of the note, dispensed with the necessity of the demand upon him. The judgment was affirmed at the General Term, and the defendant appeals to this Court.

The only question presented for consideration is, whether the change of residence of the maker, from the State of New York to the State of New Jersey, intermediate the date of the note and its maturity, dispensed with the necessity of presenting the note at the last place of residence of the maker in this State, and demanding payment thereof there. It is not contended that the holder was bound to seek out the maker or his place of residence in the State to which he had removed, for the purpose of presenting the note and demanding payment. But it is urged that the holder should have sought the last place of residence of the maker in this State, and made the presentation and demand there. The Supreme Court of this State in *Anderson* vs. *Drake*, 14 Johns. 114, say they had then (in 1817,) in a late case not reported, decided, when the

drawer of a note had removed to Canada, the note being dated and drawn in Albany, though not made payable at any particular place in that city, that a demand in Albany was sufficient to charge the indorser. It is not stated where the demand in that case was made in Albany, and it is not seen, upon the facts stated, how it could have been made, nor is any reason given for making it. It was decided in *Anderson* vs. *Drake*, *supra*, that when a note is not made payable at any particular place, and the maker has a known and permanent residence *within the State*, the holder is bound to make a demand at such residence in order to charge the indorser. The general rule is, that the holder of a note who seeks to charge the indorser, must demand payment of the note, at its maturity, of the maker, at his place of business or residence. If the note is payable at a particular place, the demand must be made at the appointed place. The holder must use all reasonable and proper diligence to find the maker, when no particular place of payment is appointed in the note. And the case of *Anderson* vs. *Drake*, *supra*, established the rule, that when a change of residence of the maker took place between the making of the note and its maturity, and no place was appointed in the note for its payment, the demand of payment must be made of the maker at his place of residence at the maturity of the note, provided such residence was within this State. *Taylor* vs. *Snyder*, 3 Denio, 145, was an action upon a note dated at Troy, in this State, the maker residing in Florida at the time of making the note, and at its maturity. No intermediate change of residence took place. The payment of the note was demanded of the defendant, the indorser thereon, at Troy, and on refusal, was protested, and notice given. Beardsley, J., reviews, ably and elaborately, all the cases where the presentment of the note for payment has been excused, and classifies the exceptions to the general rule, requiring presentment and demand to charge the indorser, and shows they all rest on peculiar reasons. He says: "In one, the maker has absconded; in another, he is temporarily absent, and has no domicil or place of business within the State; in a third, his residence, if any, cannot be ascertained; while in the fourth, he has removed out of the State, and taken up his residence in another

country. In each of these instances, let it be observed, the fact constituting the excuse occurs subsequently to the making and indorsement of the note, and it is this new and changed condition of the maker, and that only, by which the indorser stands committed without a regular demand."

In *McGurdee* vs. *Bank of Washington*, 9 Wheaton, 598, the Supreme Court of the United States say, in reference to change of residence to a foreign country, or to another State, "that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law than their abstract justice; on this point there is no other rule that can be laid down which will not have too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases, that the indorser should stand committed in this respect by the conduct of the maker. For his absconding, or removal out of the kingdom, the indorser is held, in England, to stand committed."

It is thus seen that the controlling element, which is introduced to establish the indorser's liability, is the change of condition after the making of the note. It is this change which commits the indorser, and excuses the presentment and demand of the note; and in this State the rule has been regarded as well settled, since the decision of the case of *Anderson* vs. *Drake*, that a removal of the maker after the making of the note and before its maturity, out of the State, excuses the holder from presentment and demand. It is true that the court say that in the case of the removal of the maker of the note to Canada, intermediate its making and maturity, where the note was dated at Albany, a demand in Albany was held sufficient to charge the indorser, yet it is not stated where the demand in Albany in that case was made, or if the court deemed the fact of a demand essential. The principle of the cases was, that the removal of the maker excused presentment and demand, and the Canada case was decided in harmony with that principle, and it was not necessary to the case, or to render the decision in confor mity with the previous cases, to advert to the fact that a demand of payment of the note (if any was made) was made in Albany. It

was not relied on, or adverted to, that such demand was made at any particular place, and no reason is suggested why it should have been made at all, or that its being made was regarded as a material circumstance. The Canada case is certainly no authority for the position of the defendant, that the demand should have been made at the last place of business or residence of the maker in this State. Beardsley, J., in *Taylor* vs. *Snyder*, *supra*, says, "that there is a further exception to the rule requiring a demand to be made of the maker, or at his domicil, or his place of business, for where a note is made by a resident of the State, who, before it is payable, removes from the State and takes up a permanent residence elsewhere, the holder need not follow him to make demand, *but it is sufficient to present the note for payment at the former place of residence of the maker.*"

I have looked at all the authorities referred to in support of this position, and they fail entirely to sustain the point in terms stated, and furnish no authority for the qualification that it is sufficient to present the note for payment at the former place of business of the maker. The learned judge was misled by the head-note to the case in 9th Wheaton, *supra*, which is in these words: "When the maker of the note has removed into another State or another jurisdiction, subsequent to the making of the note, a personal demand on him is not necessary to charge the indorser; *but it is sufficient to present the note at the former place of residence of the maker.*"

There is nothing in the case to warrant the qualifications or suggestions in the head-note relative to presenting the note at the former place of residence of the maker. It has long been well settled that a personal presentment of the note to the maker is not necessary to charge the indorser, neither will the presentment alone of the note suffice to charge the indorser; there must be a demand of payment, and refusal; but no case which I have met with requires that the presentment and demand should be personal to and of the maker. A demand of payment at the place of business, or residence of the maker, was sufficient, and a refusal by any one there was all that was required. In *Cromwell* vs. *Hynson*, 2 Esp. 511, it was held that the presentation of a bill to the wife, at the party's

house, he being a master of a ship, and absent from England, was a sufficient demand. (See, also, 2 Taunton, 206.) The facts as admitted in *M'Gruder* vs. *Bank of Washington, supra*, were that at the maturity of the note neither the holder or the notary knew of the removal, from the District of Columbia, of the maker who resided there at the date of the note; that ten days before its maturity he removed out of the District to the State of Maryland, nine miles distance from his previous residence. At its maturity the note was delivered to a notary, who went with it to the house of the maker, where he had resided, and from which he had removed, in order there to present the note and demand payment; and not finding him there, and being ignorant of his place of residence, returned the said note under protest. Now, it is not alleged that the notary presented the note at the last place of residence of the maker, in the District, or that he demanded payment of it from any body, and the court, in its opinion, does not advert to the fact that the notary went with the note to the maker's last place of residence, or intimate that he should have done so, and there presented it and demanded payment; but the court distinctly places its decision upon the fact that the removal of the maker, after the date of the note, and before its maturity, out of the District into one of the States, being in another jurisdiction, absolved the holder from the necessity of presentation and demand of payment, and held the indorser duly charged, though neither was done. The court gave no intimation that the note had been presented at the maker's last place of residence, or that that fact was regarded as at all material.

The next case referred to by Justice Beardsley is that of *Anderson* vs. *Drake, supra*, in which no such point arose or is referred to. The only allusion to it is the remark made relative to the Canada case, where it was said it was held that a demand in Albany was sufficient to charge the indorser. *Dennie* vs. *Walker*, N. Hamp. 199, did not present the point; but so far as it bears on the present case, is an authority to sustain the judgment in this case. There the maker of a note resided in Portsmouth, at the date of the note, but at its maturity was at sea, his family still residing there, and there had been no change of his residence. The court held that

his absence did not excuse presentment and demand at his resi dence to charge the indorser. Upham, J., says: "A removal without the bounds of the government, after the making of a note and before it becomes due, and where no place of payment of the note is specified, render a demand upon the maker unnecessary; but this is an exception to the general rule, and must be construed strictly. Anything less than an actual change of residence by removal without the State, would leave the rule too uncertain."

The next case is that of *Gillespie* vs. *Hannahan*, 4 M'Cord, Rep. 503. Here the notary made inquiry for the maker of the note in Charleston, where it was dated, and where the maker resided at the time it was made, but who had no residence at its maturity in Charleston, having in the meanwhile removed to Philadelphia. The notary protested the note, and gave notice to the indorser without having made any presentment or demand. In an action against the indorser, the court held that when the maker has removed to another State, and resided there at the maturity of the note, demand of payment was not necessary. The court says: "For all legal purposes a neighboring State is regarded as a foreign country. Bills drawn on a sister State are regarded as foreign bills, and the terms 'beyond the seas,' used in the statute of limitations, have, in construction, been applied to a neighboring State, and I come to the conclusion that, for the purposes of a demand on the maker of a promissory note, it must be so regarded, and that his absence from the State in which the note was made, and where it was understood it was to be paid, will excuse the holder from making a personal demand, in order to charge the indorser."

Reid vs. *Morrison*, 2 Watts & Sergt. 401, I regard as an authority in point. There the court held, that if the drawer of a bill or maker of a note has absconded, that circumstance will dispense with the necessity of making any further inquiry after him, citing Chitty on Bills, 261; Bayley on Bills, 95. In *Duncan* vs. *M'Cullough*, 4 Sergt. & Rawle, 480, the court say, "the same rule which exists in the case of absconding applies to that of the removal of the maker or drawer into another jurisdiction after the execution of the instrument." *Gist* vs. *Lybrand*, 3 Ohio, 307,

is also a case in point. It was urged there that no inquiry was made at the last place of residence of the maker for payment, he having intermediate the date of the note and its maturity, removed from the State. The court say, "we all concur in opinion with the Supreme Court of the United States upon the first point in this case. In the case of *McGruder* vs. *Bank of Washington*, cited by the plaintiff's counsel, they have settled that the removal of a maker of a note, after it was made and before its maturity, into a different State from where he resided when the note was made, excuses the holder from making actual demand of payment from the maker. Whether the demand should be made at any other place is not made a point or adjudicated upon in that case. But it seems to us a clear consequence of the decision that such demand was unnecessary. The fact of removal commits the indorser and dispenses with the demand, unless a particular place be appointed for the payment of the note in the note itself."

I entirely concur in the views thus clearly expressed by the Supreme Court of Ohio. I think they correctly apprehended the exact force and extent of the decision of the Supreme Court of the United States, and that case should be followed as an authority. There would have been no misapprehension in reference to that case, if the head-note of the reporter had not interpolated a qualification to the rule enunciated, not contained in the case or in the opinion of the court. This misapprehension undoubtedly led Mr. Justice Beardsley into the qualification of the rule otherwise correctly enunciated by him, and which rule was fully sustained by the authorities cited; but they do not sustain the qualification of the rule, it being only found in this head-note. The case in 9th Wheaton was decided in 1824, and I think the rule then laid down was in harmony with previous adjudications in England and in this country, and, as it establishes a uniform and reasonable and certain rule of commercial law by the highest tribunal in the country, and one not in conflict with our own decisions, I think we ought to recognise and adhere to it. This rule is approved by one of our most learned and able writers on this subject. See Edwards on Bills, pp. 485, 486.

I have been able to find but one case where a different rule has

been announced. It is that of *Wheeler* vs. *Field*, 6 Met. 290. There the court held, to charge an indorser upon a note dated in New York, where the maker had removed out of the State where it was made and dated before its maturity, that a demand should have been made at the maker's last place of residence in New York, when he had removed to the State of Illinois. No authorities are cited for the opinion expressed, and no reasons are given why it should be recognised. It is certainly in direct conflict with those which have been already referred to, and is not in harmony with the principles settled in numerous cases. We think it better to adhere to the long-settled rule as laid down in the case in 9th Wheaton, even although cases might be supposed in which its application might, by possibility, work some wrong. It is of the highest importance in a commercial community, that the rules relating to the presentment, demand, and protest of bills and notes, should be certain, and when once enunciated should be adhered to; and no reasons are suggested which we think should influence us to depart from or modify the rule as laid down by the United States Supreme Court in the case in 9th Wheaton. We think it a reasonable, just, and proper rule, and one which should have universal application.

The judgment appealed from should be affirmed, with costs.

It is much to be regretted that the rule applicable to an important point of mercantile law should be different in two States of such commercial importance as New York and Massachusetts. The opinion in the principal case shows that the weight of authority is in favor of the New York rule. The question may also be examined from another point of view.

A test by which the liability of an indorser may be ascertained, is the application of legal principles belonging to conditional contracts. Certain acts in the nature of conditions precedent, must be performed by the holder before the indorser can be regarded as liable. These conditions may be either express or implied. The general principles are in both cases the same.

I. Express conditions. The most common express condition arises when the note is made payable at a particular place. In England, it is the rule that such a condition forms part of the contract both with the maker and indorser, and no action can be brought against either, unless the condition is performed or dispensed with. In this country generally, the engagement of the maker under such circumstances is not conditional but absolute, and the failure of the holder to make the presentment can only be urged as matter of defence. The indorser may however insist that the clause forms an essential part of his contract, and that a demand should be made at the place named, in order that he may be charged. It is evident that the material point in this condition is *locality*

It is unimportant where the maker may reside. The parties have chosen by an explicit statement to contract, that though the maker may remove from the country or may abscond, the demand must be made at the place specified. It was upon this ground that Sands *vs.* Clark, 8 C. B. 751, was decided. An action was brought against the maker of a note payable at a particular place. No presentment had been made, and the excuse was offered that the maker had absconded. But as *locality* was the substance of the condition, the court held that it had not been performed, and the maker was not liable. The case was argued both by counsel and the court upon the law of conditions, and upon commercial decisions. Maine's case, 5 Coke R. 25 a, among others was cited. It was evidently the opinion of the court that the condition precedent in the case of negotiable paper would be dispensed with under the same circumstances as in other branches of the law. What would constitute a dispensation as to the maker would also as to the indorser. This was suggested by counsel, and denied by no one. It is evident, under the English law, the condition so far as it is expressed is the same in both cases.

II. It is true that there is a difference in one respect between express and implied conditions. The latter cannot affect the contract of the maker, but only of the endorser. In the absence of an express condition, the engagement of the maker is absolute. There is an entire accord between the commercial law of England and of this country in this respect. Implied conditions must, however, when they exist, be observed with the same accuracy as express conditions, and parol evidence can no more vary the one than the other. Suse *vs.* Pompe, 8 C. B. N. S. 537, (1860), Byles, J., delivering the opinion of the court.

What then are the circumstances under which the condition in question in the law of negotiable paper is waived? The indorser stipulates that certain acts in reference to the maker shall be done by the holder before he is liable, but he engages on his part that the maker shall remain in a condition to have those acts done. If the entire contract were written, it would be somewhat as follows: "it is understood that if the holder of the note shall, upon the day on which by the rules of commercial law it falls due, present it at the place of business or of the residence of the maker for payment, and if this is refused, shall give timely notice to the endorser, he will be liable. The endorser on his part agrees that the *maker shall do no act to prevent* the demand from being made in the manner agreed upon." This is the fair and reasonable construction of the contract. It is manifestly the engagement by the English law when the maker *expressly* stipulates for demand at a particular place, and no suggestion has ever been made in the English courts that the indorser's contract is in that case different from the maker's upon the subject of demand. There is, of course, no legal rule which would prevent the indorser from entering into an undertaking as to the conduct of the maker.

The circumstances dispensing with the performance of a condition precedent are thus stated by Addison. "Whenever a party by doing a previous act would acquire a right to any debt or duty, and the other prevents him from doing it, he acquires the right as completely as if it had been actually done," p. 889, and cases cited. The only inquiry then is, has the maker prevented the holder from performing the condition precedent? This is, for the purpose of charging the indorser that the note shall be demanded of the maker at his place

of business or residence. It is clear that the condition is not that the demand shall be made of the maker personally, nor at any mere *locality*, but at that place where the additional fact appears, that it is the maker's place of business or his residence. Chitty on Bills, 412; Byles on Bills, 157. It has been held that a personal demand upon the acceptor of a bill at some other place is not sufficient. King *vs.* Holmes, 11 Penna. St. 465. The element of residence is so important, that if the maker of a note payable generally happen to be out of the country of his residence when the note is made, and return before it is due, the demand must still be made at his residence. Spies *vs.* Gilmore, 1 Coms. 321. So if the maker removes after the note is made to another place within the State, demand must be made at the new residence. Demand at the *residence* is then the substantial part of the condition. If the maker removes from his residence to another State or country between the time of making the note and the day it falls due, he *prevents* the holder from fulfilling the condition. There is no necessity to present the note at the *former* residence. This would be substituting a different condition; that of *locality* instead of *residence*. It is well settled that the holder need not follow the maker out of the State to his new residence.

The result is, that the condition is entirely waived.

T. W. D.

ABSTRACTS OF RECENT ENGLISH DECISIONS.

HOUSE OF LORDS.

Joint-Stock Company—Transfer of Shares—Forged Transfer—Liability of Company to re-transfer—Suit in Equity—Action at Law.—T. and B. were in partnership, and took shares in the Midland Railway Company, as partnership property. B. forged T.'s name to a deed of transfer of the shares, purporting to be from T. and B. to L. for a nominal consideration. The company acted on this deed, and entered the name of L. as proprietor, and paid the dividends to B. for L., but B. appropriated the same, T. having died before B. *Held*, the administrator of T. had a right of suit in equity against the company, to replace the stock, and pay over the dividends which had been fraudulently obtained by B.; and it made no difference that there was no person capable of bringing an action at law: *Midland Railway Company* vs. *Taylor*.[1]

Legacy—Vesting—Gift to a Class and Survivors—Meaning of word "Vest"—General Rules of Construction.—Where a testator gives a life-estate in his funds, and at the expiration thereof gives the principal to be

[1] 6 L. T., N. S. 73.